ZELKOWITZ

Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: KCA Corporation

File: B-236260.2

Date: July 2, 1990

Steven L. Schooner, Esq., Seyfarth, Shaw, Fairweather & Geraldson, for the protester.
Herbert F. Kelley, Jr., Esq., Office of the Judge Advocate General, Department of the Army, for the agency.
Richard Zelkowitz, Esq., David Ashen, Esq., and John M. Melody, Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency's failure to provide incumbent contractor required 30 days advance notice of solicitation for successor contract, to allow incumbent time to negotiate updated collective bargaining agreement to be incorporated in new solicitation, did not by itself warrant resolicitation to incorporate updated agreement where the agreement first was submitted to the contracting officer almost 2 months after bid opening.

DECISION

KCA Corporation filed an action in the United States District Court for the District of Columbia, KCA Corp. v. Richard B. Cheney, et al., Civil Action No. 90-0246, requesting a temporary restraining order and preliminary injunction to stay performance of a contract awarded by the Department of the Army to Kime Plus, Inc., under invitation for bids (IFB) No. DAKF23-89-B-0056. KCA, the incumbent contractor, citing Federal Acquisition Regulation (FAR), 48 C.F.R. §§ 22.1010 and 22.1012-3 (1989), argues that the Army was required to cancel or amend the solicitation upon being served a copy of an updated collective bargaining agreement between KCA and its employees' collective bargaining agent and that, because the Army did not do so, the award was improper. The court has enjoined the Army from permitting Kime Plus to begin performance under the contract and has requested our decision on the merits of KCA's allegation concerning the propriety of the contract award.

We find that the award was proper.

BACKGROUND

The IFB, issued on June 9, 1989, sought bids to provide full food services and dining facility attendant services at Fort Campbell, Kentucky. Bid opening was scheduled for July 24. Preparatory to issuance of the IFB, the Army, on November 1, 1988, and again on March 9, 1989, submitted requests to the Department of Labor (DOL) for an updated wage determination, which was received and incorporated in the solicitation. On March 16, the Army synopsized the proposed procurement in the Commerce Business Daily (CBD). The Army did not, however, provide 30 days advance written notification of the procurement to either KCA or its employees' collective bargaining agent as required by 29 C.F.R. § 4.1(b)(3). On July 1, KCA filed an agency-level protest based on this absence of advance notice, requesting indefinite postponement of bid opening pending negotiation of a new collective bargaining agreement, and inclusion of a DOL wage determination reflecting the new agreement in the IFB.

The contracting officer denied KCA's protest by letter dated July 18. While conceding that KCA, through administrative oversight, had not been given 30 days advance notice, the contracting officer concluded that this did not warrant postponement of the bid opening; he noted that KCA should have been aware of the upcoming solicitation in view of its status as the incumbent contractor and the fact that the procurement had been synopsized in the CBD.

While its agency-level protest was pending, KCA entered into negotiations with its employees' collective bargaining agent. On July 17, KCA executed a new collective bargaining agreement and forwarded it to the agent for approval and eventual submission to the contracting officer. The collective bargaining agreement was not furnished to the contracting officer until September 12. On July 20, after denial of its agency-level protest but before bid opening, KCA filed a protest in our Office alleging several improprieties in the solicitation; KCA did not challenge the agency's failure to provide it advance notice, the issue here, until October 10.1/

1/ KCA's July 20 protest was denied in our decision in KCA Corp., B-236260, Nov. 27, 1989, 89-2 CPD ¶ 498. KCA's October 10 protest of this issue was untimely under our Bid Protest Regulations since it was filed in our Office

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ARGUMENT

Applicable regulations require contracting officers to give both the incumbent contractor and its employees' collective bargaining agent 30 days written notification of an upcoming solicitation for a successor contract, 29 C.F.R. § 4.1(b)(3), so they can negotiate an updated collective bargaining agreement, which the agency then provides to DOL for a revised wage determination to be incorporated in the solicitation. KCA contends that since the contracting officer failed to give it the requisite 30 days advance notification of the issuance of the IFB, the contracting officer was required to postpone bid opening indefinitely, pending KCA's negotiation of a new collective bargaining agreement. Since bid opening was not postponed, KCA maintains that, upon receipt of the agreement, the contracting officer should have requested a new wage determination from DOL and resolicited bids under a revised IFB incorporating the new wage determination.

KCA cites prior decisions of our Office in which we allegedly held that contracting officers must resolicit offers based on new wage determinations in circumstances such as those here, even if bids already have been opened. See Logistical Support, Inc., B-212689.3, B-212689.4, Feb. 14, 1984, 84-1 CPD ¶ 191; Minjares Bldg. Maintenance Co., 55 Comp. Gen. 864 (1976), 76-1 CPD ¶ 168. The only alternative, KCA notes, would be to make award based on the old agreement and then to modify the resulting contract to incorporate the new agreement; this approach would be improper, KCA maintains, because it would be tantamount to awarding a contract on terms different from those advertised.

ANALYSIS

We find the Army was not required to resolicit to incorporate the terms of KCA's new collective bargaining agreement.

The Service Contract Act, 41 U.S.C. §§ 351-357 (1988), governs the wage and fringe benefit rates to be paid employees engaged in the performance of federal government service contracts. With respect to successor contracts, the Act provides that service employees shall be paid wages and

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substantially more than 10 working days after the July 24 bid opening date. 4 C.F.R. § 21.2(a)(2) (1989). We consider the issue now only pursuant to the court's request. See B.F. Goodrich, Co., 67 Comp. Gen. 914 (1988), 88-1 CPD ¶ 471.

fringe benefits no less than were paid under the predecessor contract plus prospective negotiated increases in these wages and fringe benefits as prescribed in a revised collective bargaining agreement. 41 U.S.C. § 353(c)(3).

DOL regulations implementing the Act establish a limited exception to this requirement. Where 30 days advance notice of the successor procurement is given to the incumbent contractor and its employees' collective bargaining agent, the terms of the revised collective bargaining agreement are not effective for purposes of the Act if the agency receives notice of the terms of the agreement fewer than 10 days before bid opening and finds that there is not reasonable time still available to notify bidders of the revised rate. 29 C.F.R. § 4.1(b). The FAR repeats this exception, 48 C.F.R. § 22.1008-3(c), emphasizing that the exception is inapplicable where timely advance notice is not given. 48 C.F.R. § 1012-3(c). In such cases, the Act specifies that the terms of the revised collective bargaining agreement will be applicable to the successor contract. This is the situation here.

The remaining question, and the determinative issue in this case, is how a new agreement is to be made applicable to the contract where bids have been opened and award is imminent--by amending the solicitation and resoliciting or by proceeding with the award and modifying the resulting contract to include the new agreement.

KCA asserts that resolicitation is required under our prior decisions; we disagree. We recognized in Minjares, which involved a negotiated procurement, the general rule that an agency must award a contract on the same basis on which it was competed, without the intent of materially modifying it after award. We then determined that resolicitation was the appropriate means of effectuating the new agreement in that case only after considering a number of factors (e.g., the fact that the agency was aware of the new wage determination 1 month prior to award, and that the prior wage determination was more than 1-1/2 years old). In Logistical Support, the agency had a revised wage determination at least 10 days prior to bid opening, knew that the determination was higher than previous wages, and knew that the contract would have to be modified after award to incorporate the determination.

We have not imposed an absolute requirement for resolicitation under all circumstances because contracting agencies have a legitimate need to proceed with award in an orderly fashion. A rigid rule would place incumbent contractors in a position to delay contract award for their own benefit, as they control the timing of submission of revised collective

bargaining agreements. For example, if 30 days advance notice of a successor contract were not given, the incumbent contractor could purposely delay submitting a revised collective bargaining agreement to the agency until after all bids were revealed at bid opening; if not low, it would submit the agreement to force resolicitation, thereby delaying award and possibly necessitating extension of its existing contract. A more flexible rule permits consideration of the principle that, after bids have been exposed, agencies generally should proceed with award. See, e.g., FAR, 48 C.F.R. § 14.404-1 (cancellation after bid opening proper only where there is a compelling reason to do so).

As stated above, KCA executed a revised collective bargaining agreement with its employees' collective bargaining agent on July 17, yet did not furnish the Army with a copy of the agreement until September 12, more than 3 months after issuance of the solicitation, when award was imminent (although delayed by KCA's protest of the procurement on grounds not in issue here). KCA had ample opportunity to notify the Army at a much earlier date, yet did not do so despite knowing from the IFB of the Army's need to proceed with award to facilitate transition to a successor contractor and allow for a 30-day phase-in period. Moreover, although apparently believing that the Army improperly had denied its agency-level protest, KCA did not avail itself of the opportunity to promptly resolve questions pertaining to the applicability of a revised collective bargaining agreement by including the issue in its subsequent protest to our Office.

KCA's unexplained delay in submitting the revised collective bargaining agreement to the Army clearly undermined the agency's interest in proceeding with a prompt award. Under the circumstances, we think the interests of the procurement process will be better served by allowing the Army to modify Kime Plus' contract to reflect the new agreement than by endorsing the disruption of the process that can result from the late submission of revised collective bargaining agreements to contracting agencies.

We conclude that the Army's award of the contract to Kime Plus was proper, and that it is not required to resolicit based on KCA's new collective bargaining agreement.

for James F. Hinchman
General Counsel